



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Reportable/Of interest to other judges

Case no: JR 1898/2020

In the matter between:

**SIBANYE GOLD LIMITEDT/A SIBANYE
STILLWATER**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER MAKOLE JACOB
MOKGOSI N.O**

Second Respondent

AMCU OBO TITUS TLOTLISO MAOENG

Third Respondent

Delivered: 10 April 2025

Summary: (Review – Reinstatement application - Bona fide misapprehension that Rule 22B notice had been filed timeously, within a year of launching review – Omission not the cause of any delay in the enrolment of the review – reinstatement ordered. Dismissal – Intimidation vs Inappropriate Pressure Arbitrator finding that complainant was not unreasonably fearful, but no evidence to support the conclusion that a threat was made, nor that the misconduct was intended to intimidate the complainant – Arbitrator dismissing

charge of intimidation but finding employee guilty of improperly pressurising the complainant – reinstatement with limited backpay and a final written warning – Outcome not untenable)

JUDGMENT

LAGRANGE, J

Nature of the application

- [1] This is an opposed review application, which had lapsed. The applicant ('Sibanye') has applied to reinstate the review application. This application was unopposed. Both applications were enrolled together.

The reinstatement application

- [2] The review application had lapsed as a result of no further step being taken for more than twelve months to prosecute the review after it had been launched. This was a result of an omission by Sibanye's attorneys to file the Rule 22B notice requesting the enrolment of the review application timeously on the Registrar, within twelve months of the review being launched. The notice had been served timeously on the respondents. In the mistaken belief that the matter was not out of time and the enrolment of the application was pending a decision by the Registrar, the attorneys waited for a date allocation. When enquiries were made about it, they were advised that it was still awaiting a date allocation. It was only in December 2023, when an audit of review matters was conducted by the firm that it was realised that the review application had lapsed on 20 December 2021 on account of the late filing of the Rule 22B notice. It is apparent, the Court was unaware of this and the matter was eventually enrolled for a hearing in August 2024. An application for reinstatement was nevertheless made.

- [3] In view of the lack of opposition to the reinstatement of the review and given that it was that the delay in enrolling the review was not a consequence of omission to file the Rule 22B notice on time, I am satisfied the review application should be reinstated.

The Award

- [4] At the commencement of the hearing, the arbitrator dismissed an application to postpone the hearing because the mine claimed the key witness was involved in another arbitration. In his reasoning the arbitrator stated that there were no compelling grounds to grant the indulgence. The key witness was not necessarily the only one and the mine should have been prepared to proceed if its application was not granted. The arbitration could not be concluded on 17 March and resumed on 3 August and 4 November 2020,
- [5] Mr T Maoeng ('Moaeng') was employed as a rock drill operator by the applicant ('Sibanye'). Maoeng was dismissed on 17 December 2019 for telephonically intimidating/harassing a colleague in the HR department during a strike called by his union ('AMCU'), which commenced on 13 December 2018. AMCU opposes the review application on his behalf. Maoeng was an AMCU shop steward and also held a position in AMCU's Education Structure.
- [6] Maoeng had been charged in the alternative, with committing misconduct characterised as *"behaviour prejudicial to the maintenance of good order"* It was alleged that apart from being in contravention of the disciplinary code, he had also breached a court order which was in force at the time of the strike. There was evidence that the strike was very violent, resulting in 25 deaths and 25 serious injuries.
- [7] The incident giving rise to the dismissal was a phone call Maoeng made at 06:30 on the morning of 13 December 2018 to Ms M Moleli¹ ('Moleli'), an HR superintendent at Beatrix Shaft 3. Moleli testified that she was shocked to receive a call so early from him. He asked her where she

¹ As she then was.

was, if she was already at work, and when he realised she was not at work, what time she was going to report for work. In the arbitration hearing he testified that he then asked her about mine employees who had allegedly been 'paraded' by the mine and 'made to join' other unions. In the context of the violent strike by AMCU members Moleli said she felt threatened by his questions.

- [8] Immediately after the call she reported the incident to Potgieter, the General Manager, and the Employee Relations manager, Mr M Zulu ('Zulu'), saying she had received a threatening call from Maoeng and felt she was going to be another strike victim.
- [9] The priority crime prevention investigator, Mr H Gephard, testified that when he was first in contact with Moleli, he observed she was "*very much scared*". She was escorted to and from work by SAPS for a month and SAPS conducted regular patrols at her house. He also testified that non-strikers were attacked on their way to and from work and their houses were burnt down.
- [10] On the same morning she received the call from Maoeng she was phoned by two other local union leaders. Mr Marawana, the AMCU branch secretary, was the next to phone, followed by Mr X Phololoshi ('Phololoshi'), the AMCU regional chairperson. She also received a second call from Maoeng who had been spoken to by Zulu. Zulu had phoned Maoeng about what Moleli had reported to him about Maoeng's first call. Maoeng's follow up call was made before Marawana and Phololoshi phoned Moleli. All the calls to Moleli were recorded and translations of the calls were extensively referred to in the proceedings.
- [11] In his follow-up call Maoeng related to Moleli that he had y told Zulu that he had merely spoken to her because of the kind of person she is. Moleli then interrupted Maoeng, saying "*The fact of you asking where I am and further asking what time am I leaving home and I then started asking myself as to what is it that's being planned against me.*" Moleli did concede under cross-examination that she had not complained about the way he was speaking to her, but all her subsequent actions, showed she was deeply distressed by what he said. She elaborated on

her fears, saying that she was afraid because it was being said that people were approaching people at their homes, so she did not know what to say in a case like that, especially because she was a woman and was truly scared. She said she had even decided that she was not going to work because she felt if she could be killed going to work, she would rather be killed at home. Maoeng tried to placate her, saying he apologised if he had scared her and that he is not that bad and that he approached her because she knew she would not do something that was not right. He said it was not his intention to threaten her.

- [12] In Marawana's call to Moleli, he came directly to the point, telling her that he heard that she and two other named HR staff members were parading AMCU members to recruit them for NUM. She told Marawana this was the second call she had received, and she felt threatened by being asked her whereabouts. Marwana said she should not worry about that, because those were 'stupid things' said by Maoeng and he would speak to him. He advised her to tell anyone else who called that she had spoken to him. She insisted that only non-union members were paraded.
- [13] One leg of Maoeng's defence was that his conduct in speaking to Moleli was indistinguishable from the conversation she had with Marawana, who was acquitted on a similar charge of intimidation arising from his own conversation with Moleli. Sibanye had contended that the cases were distinguishable because Marawana did not question Moleli about her whereabouts but conveyed the union's concerns of members about the parades which were being held. The union retorted that the chairperson found that in Marwana's case she was threatened by his tone and accusation. She could not explain what it was about what that Maoeng had said that intimidated her. The chairperson of Marawana's enquiry had accepted that Marwana wanted to find out the truth about the parading of non-union employees and found him not guilty of intimidation for that reason.

- [14] In analysing the critical phone call the arbitrator also listened to the recorded conversation as he understood the language so was not entirely reliant on the translated transcripts.
- [15] He found it was undisputed that the conversation began with the normal greetings and Maoeng had simply asked Moleli if she was already at work which sounded like *"a fair question"*. He (Maoeng) accepted Moleli's evidence that she only reported at 0600 and that is why he found her at work at that time. She had explained to Maoeng that she acted on instructions and could not do as she liked but now they wanted to *"shoot her"* as if she was responsible for the decisions. The arbitrator translated the second question posed to her as *"What time do you report for work?"* followed by the third question *"Are you still at home?"*. He found that Moleli clearly felt uncomfortable with these questions and wanted to know why he was asking such questions. Maoeng had answered that he wanted to secure a meeting with her when she was at work and she said he could get in touch with him when she was already at work. The arbitrator concluded that Maoeng had provided a reasonable explanation for the questions he posed to her and that is where the conversation should have ended if it was his intention to secure a meeting with her, but he went beyond that and started to ask about HR issuing stop orders. When she confirmed that it was non-unionised employees who had been paraded to choose which union they wanted to join, he then prompted her to try and find out who had issued the instruction, but she was reluctant to do so.
- [16] The arbitrator reasoned that whether Maoeng was not the sort of person who would harm or injure Moleli, her perception of being threatened was determined by her own sensibilities of feeling unsafe, threatened and intimidated, which he found *"under the circumstances reasonable."* He noted that she had immediately reported Maoeng's call to superiors even before she received the calls from Marawana and Pololoshi.
- [17] He rejected Maoeng's alleged reason for calling Moleli to obtain clarity on the stop orders, because he had testified that he was already aware

what was happening before he found her. However, in his view, the critical question was whether he intended to threaten or intimidate her. The arbitrator accepted that Maoeng had put pressure on her to disclose the name of the person who gave the instruction and that it was probable she did not because she feared what might befall her supervisor if she did. The arbitrator stated: *"Her apprehension of fear associated itself with the violent acts that occurred during AMCU's strike."*

- [18] Having found that it was reasonable for Moleli, under the circumstances of the violent strike, to have felt unsafe and threatened, given her sensibilities, he nevertheless concluded that, objectively speaking, Maoeng had not said anything directed at her that would have made any reasonable person in her position fear imminent harm or injury. He noted that Maoeng had ended the conversation when Moleli said she did not know what to say anymore and the conversation concluded on a friendly note.
- [19] However, he did not find Maoeng's conduct blameless. As mentioned, he concluded that Maoeng had pressurised Moleli to disclose who had instructed her to parade non-striking employees for the ostensible purpose of determining their union affiliation. He concluded that, *"(w)hile the applicant's conduct of putting undue pressure on Moleli amounted to inappropriate behaviour and it left her feeling unsafe, I could not find that it could be elevated to the level of intimidation or threatening conduct."* Accordingly, he concluded Sibanye had not proven that the dismissal was substantively fair.
- [20] He then proceeded to award reinstatement because it is the primary remedy for a substantively unfair dismissal, but in light of the nationwide lockdown during COVID-19 he did not award full back pay. He also made Maoeng's reinstatement subject to him being issued with a twelve month final written warning for his inappropriate conduct. He ordered the payment of backpay from January to November 2020 excluding the months of April, May and June that year.

- [21] Given his reasoning, the arbitrator obviously did not find it necessary to address the union's other claim that Maoeng's dismissal was inconsistent with its failure to dismiss Marwana for the same reason.
- [22] The arbitrator found that management's action of parading employees to join trade unions had prompted a knee-jerk response by the union, but there was no directive indicating that he ought to have approached other managers to complain about the issue, rather than Moleli.

Grounds of Review

- [23] In broad terms, Sibanye argues the arbitrator misconceived the nature of the inquiry or failed to consider material evidence. Apart from demonstrating these flaws, it needs to show that they had led the arbitrator to reach a conclusion no reasonable arbitrator could have arrived at on the evidence presented². The more detailed shortcomings alleged by the employer are summarised below.
- [24] Firstly, it argues that the arbitrator did not consider the evidence that demonstrated that Moleli was clearly scared and that Maoeng realised he had behaved inappropriately when he spoke to her the first time, which caused him to phone her again. It was also argued that the arbitrator ought to have realised that Maoeng only phoned her a second time because her supervisor had phoned him to complain about his call and he was trying to avoid disciplinary action.
- [25] Sibanye complains further that the arbitrator overlooked that Maoeng was persistent in pressing Moleli to disclose the name of the superior who had instructed her to parade non-union members. Moreover, he had already taken the matter up with her superiors so there was no reason for him to speak to her as well. He claimed he only spoke to her because there was no one else he could ask about the complaints from members, which begged the question why he phoned her superiors.
- [26] Sibanye contends, in effect, that the most probable and plausible explanation for Maoeng's call was to intimidate her or management to

² See *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at paragraphs 32 and 33.

stop parading employees and that they might suffer harm if they continued. It cited Moleli's undisputed evidence that previously she had never received calls from AMCU members or officials during strike action and the call should have been directed towards the Employee Relations department. Moleli testified that Maoeng informed her they had already told her supervisors to refrain from holding the parades and the arbitrator had also found it was unlikely that his enquiry was an innocent one about stop orders because he said he was already aware what was happening before he called her.

[27] It also argues that the arbitrator committed a gross irregularity by failing to have regard to the context and background of the words used. All the persons who phoned were union officials or leaders. The strike was particularly violent, resulting in deaths and destruction of houses and an interdict had to be obtained specifically interdicting acts such as intimidation despite management having issued a brief that it would take disciplinary action against any form of intimidation, be it verbal or physical. Non-strikers had been attacked going to and from work. Maoeng himself conceded that everyone was scared due to the strike. All of this ought to have compelled the commissioner to conclude that there was a climate of fear and workers were on edge, which meant that Maoeng's conduct added to the fear. As to the contention that Moleli accepted his subsequent apology, that did not detract from what she felt at the time, which is what she said she had relayed to her superior and to Marawana

[28] Further, Sibanye submitted that the arbitrator's finding that Moleli was not intimidated, was irreconcilable with his other findings, such as his observation that Moleli felt uncomfortable about Maoeng asking about her whereabouts and that her feeling of being, unsafe, threatened and intimidated was reasonable in the circumstances. He had also accepted that Maoeng had pressurised Moleli to provide the name of the supervisor who instructed the parade of non-members to be held, which she did not disclose because she feared what might happen to that supervisor if she did. His conclusion that there were no words which

objectively could have made her fear any harm was irreconcilable with these findings.

Discussion

- [29] The first point that needs to be made is that, contrary to the argument that he ignored the context in which the misconduct took place, the arbitrator carefully considered the effect of the general context of serious strike violence and how Moleli herself had interpreted Maoeng's call in that context.
- [30] The crux of the matter concerned whether it was Maoeng's questions about Moleli's whereabouts when he phoned her that was intimidatory. Sibanye argued it was this which distinguished Maoeng's call from Marawana's. Moleli also made it clear that this what concerned her about his call, when he phoned her very shortly afterwards to apologise. She explained that she construed his questions as a way of ascertaining where she might be accosted or attacked on her way to or from work.
- [31] It is clear Maoeng was trying to ascertain Moleli's whereabouts when he phoned her. He said it was because he wanted to meet her. He did not ask where she lived. It is not an untenable interpretation of the opening portion of the conversation that he was hoping to meet her that morning to discuss the parading of employees and that was the reason for his enquiries about her whereabouts, rather than determining where she might be ambushed on her way to or from work. It was not necessarily sinister, though in Moleli's anxious and fearful state, she did see it that way. The arbitrator was alive to the fact that Moleli felt extremely vulnerable given the level of violence which had accompanied the strike which had resulted in the death of a number of non-union members and that some had their homes burned. He accepted that from her subjective perspective it was understandable she harboured such fears.
- [32] But he was also alive to the complexity of a charge of intimidation and that it was not sufficient just to establish that Moleli was genuinely alarmed by Maoeng's questions about her whereabouts. He found it

was necessary also to prove that Maoeng's questions, objectively speaking, conveyed the fears she entertained and whether he probably intended to intimidate her³. As mentioned, a more innocuous interpretation of the import of Maoeng's queries about where she was that morning, namely that he wanted to meet her and that it seemed he was trying to ascertain when she would be at work, cannot be simply dismissed as implausible.

- [33] Nevertheless, the arbitrator did not ignore that Maoeng's call was aimed at trying to pressurise Moleli to reveal the HR staff member who had issued the instruction to parade the unionised employees. It was not disputed that she was the person who had been instructed to parade the employees at the shaft where complaints raised by AMCU members had emanated from. It is apparent from his enquiries and the successive calls she received from Marawana and Phololoshi that they were all with the object of identifying who was behind the decision. In passing, it seems probable that these calls were not coincidental but were probably intended as an escalating pressure on Moleli to provide the information, though they did not entail implicit or explicit threats of retaliatory conduct against her if she did not co-operate. It should also be noted that, unlike Maoeng's call, Marwana and Pholoshi directly accused Moleli of attempting to recruit employees for other unions,

³ In this regard, it is interesting to note that the arbitrator's approach to intimidation is consonant with a number of constitutional challenges to the Intimidation Act 72 of 1982 have whittled down the scope of the criminal offence to focus on the intent of the alleged offender, viz:

"Section 1. Prohibition of and penalties for certain forms of intimidation

(1) Any person who—

(a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint—

(i) assaults, injures or causes damage to any person; or

(ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or

(b) ...

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment."

See also the discussion in S Horton, "The Nature and Ambit of the Intimidation Offence", *Obiter*, v 44, 2023

which Maoeng had not done. Moleli had also found those accusations threatening, but agreed that Maoeng had never gone so far as to accuse her of doing that.

- [34] The common component of all the calls also contextualises what prompted Maoeng to make his call in the first place. It was not about finding out Moleli's location or route to and from work but about ascertaining who had instructed that employees should be paraded.
- [35] It must also be pointed out that it is far from obvious that Maoeng already had all the information about the parading from Moleli's seniors. His version was that they had denied it was happening, and the union had told them to refrain from doing so. It was only on the morning of 13 December when he received calls from members giving details of the parade which had taken place at Shaft 3 that he received concrete details that it was happening. He had phoned Moleli because she was the HR staff member convening the parade and the union wanted to know who had authorised it.
- [36] It is apparent also that Moleli herself felt pressurised by all the callers to disclose the identity of the person who had authorised the parading of non-members, but did not identify that as the reason she became fearful owing to Maoeng's call, even though she was concerned to protect the person in question by not identifying them. Her complaint to Zulu, which was reflected in her response to Maoeng when he phoned to apologise was about feeling threatened because of her interpretation of his enquiries about her whereabouts.
- [37] The object of Maoeng's second call is open to different interpretations. On the one hand it might be interpreted as a cynical attempt to pre-empt or minimise the prospect of disciplinary action because he had been phoned by Zulu about Moleli's complaint. Alternatively, it could plausibly be interpreted as a genuine attempt to apologise if he had caused her to feel intimidated. It could equally plausibly be interpreted to have had a dual purpose of mitigating the consequences of prospective disciplinary action and to genuinely apologise. The fact he did not hesitate to phone her back, is consistent with any of those

alternatives. What is somewhat distinctive, is that Maoeng told Moleli she was right to raise her concerns with Zulu. He did not criticise her for doing so. Nonetheless, for the purposes of the review all that matters is that it cannot be said with any certainty that the only plausible purpose of the second call must have been a cynical one.

[38] There may have been some inconsistencies in the arbitrator's reasoning, but he was dealing with a nuanced situation, in which the distinction should between improperly harassing an employee and conduct conveying a threat in the event the subject of the threat did not comply is one on which reasonable arbitrators might disagree.

[39] In the light of the discussion above, the arbitrator's effective conclusion that the content of Maoeng's questions about Moleli's whereabouts might understandably have invoked fear in her but were probably not made with the intention of intimidating her, was not an untenable conclusion to reach on the evidence. His finding that Maoeng's conduct of putting undue pressure on Moleli was nonetheless inappropriate and deserving of a sanction less severe than dismissal was correspondingly within the range of justifiable outcomes an arbitrator might arrive at on the evidence.

[40] In conclusion, I am satisfied that the award was not one that no reasonable arbitrator could have arrived at and accordingly, the award should stand.

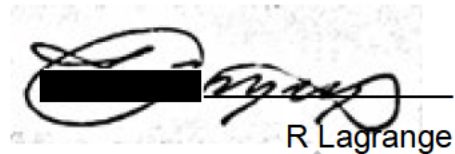
Costs

[41] There is an ongoing relationship between AMCU and Sibanye and the employment relationship between Maoeng and the mine was restored by the award. In the circumstances, considerations of law and fairness do not warrant a cost award.

Order

1. The review application is reinstated.

2. The review application is dismissed.
3. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

Representatives

For the Applicant:

Adv. R Itzkin instructed by
Solomon Holmes Attorneys Inc.

For the Respondent:

Adv S Saunders instructed by Larry Dave Inc.